IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI-GOA.

SECOND APPEAL NO. 35 OF 2006
WITH
CIVIL APPLICATION NO. 56 OF 2006

Smt. Maria Filomena Silveira Pinto,
major in age, housewife, married,
wife of Antonio Jose Pinto,
r/o Old Market, Margao-Goa. .... Appellant

Versus

1. Shri Francisco Furtado,
   major in age, service,
   and his wife

2. Smt. Estefania Furtado,
   major in age, housewife,

   both residents of Aquem,
   near Electricity Department,
   Margao-Goa.

3. M/s. Delta Real Estates,
   a proprietary concern,
   through its Proprietor,
   Shri Jayant Vinayak Naik,
   major in age, with its office at 212,
   1st Floor, Municipal Building,
   Opposite Pimpalkata, Margao, Goa.

4. Margao Municipal Council,
   through its Chief Officer,
   with office at Municipal Square,
   Margao-Goa.

5. Southern Planning & Development Authority,
   through its Member Secretary,

with office at Dattaprasad Building,
Pajifond, Margao, Goa.

Shri A.F. Diniz, Advocate for the Appellant.
Shri I. A. Agha, Advocate for Respondent No.3.
Shri S.D. Padiyar, Advocate for Respondent No.4.
Shri M. Pereira, Advocate for Respondent No. 5 – absent.

CORAM : **P.V. KAKADE, J.**

DATE : **18th October, 2006**

ORAL ORDER :

Heard the learned Counsel for the appellant as well as respondents no. 3, 4 & 5. Respondents no. 1 & 2 did not appear, though duly served in the beginning. Thereafter, it appeared that there was possibility of the settlement of the matter and, therefore, notice was again issued to respondents no. 1 & 2. However, it could not be served.

2. The unsuccessful plaintiff has preferred this appeal against the judgment and order passed by the Adhoc Additional District Judge, South Goa, Margao dismissing the appeal and confirming the judgment and order passed by the Civil Judge, Senior Division, Margao dismissing the plaintiff's suit.

3. The appellant/plaintiff came with a suit for declaration that defendant had no right to construct soak pit and suit projection and defendants' construction was not according to the approved plan and hence deserved to be demolished and, for permanent injunction, restraining the defendants from constructing soak pit, restraining the defendants from interfering with the water drain, restraining defendants from carrying out construction as per the approved plan, restraining the defendant for issuing and obtaining occupancy certificate and licence for construction. The suit was vehemently challenged on behalf of the contesting defendants who sought dismissal of the suit on various grounds.

4. The learned trial Judge after hearing both the parties and on the basis of available evidence and pleadings came to the conclusion that the plaintiff failed to prove that adjacent to her eastern wall there is water passage 75 cms. in width, to allow the flow of water from the roof of the plaintiff's house. It was further held that the plaintiff failed to prove that defendant no.3 has constructed the suit projection almost touching the roof tiles of the plaintiff's house and that the water from the said projection falls on the wall of the plaintiff's house. The trial Judge also held that the plaintiff failed to prove that defendant no.3 has constructed the soak pit at

the distance of 12.50 metres from the drinking water well of the plaintiff and further failed to prove that the construction of the defendants no.1, 2 & 3 was not in accordance with the approved plan and consequently, the same has to be demolished by defendants no. 4 & 5 and hence, suit came to be dismissed. The appeal was carried to the District Court and the learned Additional District Judge after hearing both the parties and on the basis of available evidence and pleadings recorded by trial Court, dismissed the appeal.

Hence the present appeal.

5. At the outset, it may be noted that the learned Counsel for both the parties took me through relevant aspects of the evidence on record concerning issues involved and I am satisfied that there is absolutely no substantial question of law involved in this appeal. The learned Counsel for the appellant sought to raise initial objection to the impugned judgment on the ground that it was not in compliance with the provisions of Order 41 Rule 31 of the Civil Procedure Code in as much as first appellate Court had failed to frame the points of determination as required under the said provisions. However, on perusal of the entire judgment, I am satisfied that though solitary point of determination framed is omnibus, in the sense that

it is worded to the effect that whether the trial Court erred in dismissing the suit and the finding was recorded in the negative. However, perusal of the entire judgment leaves no doubt that he has dealt with all the relevant aspects involved in the dispute and evidence on record and, therefore, no prejudice is caused to the parties involved. It is apparent that there is total application of mind of the learned appellate Court Judge to the dispute at hand and, therefore, I hold that it does not suffer from the vice of non compliance of provisions of Order 41 Rule 31 of the Civil Procedure Code. In this regard, my attention was brought by the learned Counsel for the respondent to the recent ruling of the Supreme Court in the case of ***G. Amalorpavam & Ors.*** **Versus** ***R.C. Diocese of Madurai and Ors.*** **(2006) 3 SCC 224,** wherein it is held that if it is possible to make out from the judgment of the appellate Court that there is substantial compliance with requirements of Order 41 Rule 31 and that justice has not thereby suffered, that would be sufficient. It cannot be said that the judgment is bad on that count and, hence, applying the ratio of the Apex Court ruling, I hold that non-compliance of Order 41 Rule 31 of the Civil Procedure Code cannot be held to be substantial question of law in this case.

6. Coming to the second argument of the learned Counsel for the

appellant with regard to the evidential aspect to the effect that issue no.1 raised by the trial Court was held to be redundant in view of the alleged lack of absence of pleading of cause of action, when it has been the case of the appellate Court throughout that the water drain/gutter had been blocked by respondent nos. 1 to 3, the parties went to trial on issue no.1 that was framed. This argument is obviously based on the observations made by the appellate Court in para 13 of the said judgment, wherein it is observed that the second prayer is to restrain the defendants from constructing suit soak pit and suit projection. The said prayer had become infructuous because admittedly, the building has already been constructed and the suit soak pit and suit projection have already been constructed. This observation is apparently made on the basis of admissions given by PW 1 and PW 2 to the effect that new building is completed and is occupied by the people. In my considered view, if the cognizance of this aspect is taken by the appellate Court while adjudicating the appeal, there is no illegality in holding that the issue revolves around that aspect is redundant. Similar would be the reasoning applicable to the drain which is sought to be urged on behalf of the appellant. Be as it may, it is purely the question of fact and cannot be gone into in the second appeal.

7. As observed by the Apex Court in the case of ***Kondiba Dagadu Kadam versus Savitribai Sopan Gujar*** **(1999) 3 SCC 722**, the concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under Section 100 of the Civil Procedure Code. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. Under the circumstances, I do not see any merit in this appeal as no substantial question of law appears to be involved therein. Hence the appeal deserves to be and stands dismissed with no order as to costs. Consequently, civil application no. 56 of 2006 also stands disposed of with no order as to costs.

P. V. KAKADE, J.

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